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Supreme Court of the United States

OCTOBER TERM, 1941

No. ~~1138~~ 74

WALTER L. MANGUS and ROSE L. MANGUS,
PETITIONERS,

vs.

MATTHEW A. MILLER,
RESPONDENT.

Brief of Respondent Opposing Writ of Certiorari.

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TABLE OF CONTENTS

		Page
I.	STATEMENT	1
II.	THE PETITION OF WALTER L. MANGUS, ONE JOINT TENANT, DID NOT CONFER JURISDICTION OVER THE JOINT ESTATE	3
III.	THE SUBSEQUENT JOINDER BY ROSE L. MANGUS, THE OTHER JOINT TENANT, AFTER FORFEITURE OCCURRED DID NOT SUPPLY JURISDICTION	8
IV.	PRACTICAL ASPECTS	9
V.	CONCLUSION	12

TABLE OF AUTHORITIES

Page

Barney vs. Baltimore City, 6 Wall. (73 U. S.), 280, 18 L. Ed. 825 ..... 3, 5

Bastian vs. Erickson (10 Cir.) 114 F. (2d) 338 9

Beihl, In re (D. C. Pa.), 197 F. 870 6

Benitez vs. Bank of Nova Scotia (1 Cir.), 125 F. (2d) 523 ..... 7, 10

Berry, In re (D. C. Mich.), 247 F. 700 6

47 C. J. 366 3

California vs. Southern Pacific R. Co., 157 U. S. 229, 15 S. Ct. 591, 39 L. Ed. 683 ..... 3, 5

Christy vs. Guild (Utah), 121 P. (2d) 401 8

Columbia Airways vs. Stevens, 80 Utah 215, 14 P. (2d) 964 8

Federal Land Bank vs. Sorenson (Utah), 121 P. (2d) 396 8

Franz vs. Buder (8 Cir.), 11 F. (2d), 854 4

Harris, In re (D. C. Md.), 15 F. Supp. 404 ..... 4, 6, 10

Hoyt vs. Upper Marion Ditch Company, 94 Utah 134, 76 P. (2d), 234 4

Kearns, In re, 8 F. (2d) 437, 6 Am. Bankr. Rep. (N. S.) 614, certiorari denied Cullom vs. Kearns, 46 S. Ct. 203, 269 U. S. 587, 70 L. Ed. 426 6

Leone vs. Zuniga, 84 Utah 417, 34 P. (2d) 699, 94 A. L. R. 1232 8

Malmstrom vs. Second East Apartment Co., 74 Utah 200, 278 P. 811 8

McMullen vs. Zabawski (D. C. Mich.) 283 F. 552 6

Meyer, In re, 81 A. 145, 232 Pa. 89, Ann. Cas. 1912C, 1240, 36 L. R. A. (N. S.) 205 6

Mickelson vs. Anderson, 81 Utah 444, 19 P. (2d) 1083 4

Miller vs. Mangus, 125 F. (2d) 507 ..... 7, 8

Page

Munson vs. Apartment and Hotel Investment Co., 62 Utah 13, 218 P. 109 8

5 Pomeroy's Equity Jurisprudence 4805, §2135 3

Reader vs. District Court, 98 Utah 1, 94 P. (2d) 858 4

Shields vs. Barrow, 17 How. 130, 58 U. S. 159, 15 L. Ed. 158 3

2 Thompson Real Property 927, §1712 6

Tullis vs. Pratt, 86 Utah 244, 42 P. (2d) 222 8

Bankruptcy Act §75(s)(4) 1, 6

Union Bank vs. Byerly, 60 S. Ct. 773, 310 U. S. 1 9

Wright vs. Union Central Life Ins. Co., 58 S. Ct. 1025, 304, U. S. 502 ..... 7, 9

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No. 1138

WALTER L. MANGUS and ROSE L. MANGUS,
PETITIONERS,

vs.

MATTHEW A. MILLER,
RESPONDENT.

BRIEF OF RESPONDENT OPPOSING WRIT OF CERTIORARI.

I.

STATEMENT.

The Frazier-Lemke Act provides for the joinder of all cotenants in a petition for relief of farmer-debtors:

> "The provisions of this title shall be held to apply also to partnerships, common, entirety, *joint*, community ownerships, . . . *and any such parties may join in one petition.*" §75(s)(4). 11 U. S. C. A. §203 (s)(4).

Congress thus recognized that farm properties like others are often held by *partners;* by husband and wife as tenants by the *entirety* or by the *community;* by some individuals as *tenants in common* and by others as *joint tenants.*

Congress also was thus cognizant of the ancient and well-founded *equity* rule which would apply to the Act (for bankruptcy is an equitable proceedings) that all who have an interest in property to be dealt with (indispensable parties) must be in court; otherwise *jurisdiction* is lacking, —lacking as to *absent* parties because of no jurisdiction over their persons and also lacking as to those *present* because of the impossibility of making a binding and effective decree without affecting the interests of the absent parties.

But Walter and Rose Mangus did not join in one petition as the Act directs. They were purchasing from respondent under an executory contract reserving title in the seller until final payment. By the contract they were *joint-tenant* purchasers (R. 5).

The contract had been made only 23 months but the purchasers were already in default in its $35.00 monthly payments by many months, so on November 30, 1940, respondent, the seller, demanded that they cure their default by January 3, 1941 or the contract would thereupon forthwith terminate (R. 5). They refused to do so. Instead, 6 days before that date, Walter, the husband, filed his petition for relief and listed the property as his (R. 6). But Rose, his wife, and joint tenant under the purchase contract, did not join. The court thus was without jurisdiction under the rule.

January 3, 1941, the forfeiture date, came and went. Respondent moved to strike the property for lack of jurisdiction; Rose not being in court and her interest meanwhile having terminated January 3rd (R. 4). Awakening she filed her "Joinder" and adopted Walter's petition and schedules (R. 6). But her interest had already terminated. Respondent again moved to strike (supplemental motion R. 7-8). The motions were denied (R. 9-10) without opinion. The Circuit Court of Appeals reversed (125 F. (2d) 507. R. 34) and struck the property recognizing the impossibility of jurisdiction to effect relief without both joint tenants and the joint estate being in court. This we will see was the result required by the rule and the only one the Circuit Court of Appeals could logically reach.

II.

THE PETITION OF WALTER L. MANGUS, ONE JOINT TENANT, DID NOT CONFER JURISDICTION OVER THE JOINT ESTATE.

> "The general rule in equity, as to parties, is that all those must be made parties whose interests in the subject-matter of the suit, and the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, *without which the court cannot proceed.*" (Italics added) 5 Pomeroy's Equity Jurisprudence 4805, §2135.

The rule is well illustrated in partition suits. It is well settled in such cases that all cotenants must be present because a final decree cannot be made without all interests which are to be affected being before the court. Pomeroy supra.

If the rule is not complied with, any decree is *void*. 47 C. J. 366. Void not only as to absent parties because of lack of jurisdiction over them, but also *void* as to parties present for the impossibility of making an effective and binding decree without all interested in the land being in court. C. J. supra.

This court has always recognized the rule. It applies in partition suits. Barney vs. Baltimore City, 6 Wall., (73 U. S.) 280, 18 L. Ed. 825. In junction cases. California vs. Southern Pacific R. Co., 157 U. S. 229, 15 S. Ct. 591, 39 L. Ed. 683.

In Shields vs. Barrow, 17 How. 130, 58 U. S. 159, 15 L. Ed. 158, a suit to set aside a compromise agreement concerning promissory notes, this court held itself powerless to enter a decree and ordered dismissal because only two endorsers were parties; the maker and other endorsers being absent. Such being the scope of the bill and its parties, it was said to be "clear" that a court was powerless to make a decree because the parties were of the third class below mentioned. There are, it was said, three classes of parties (1) formal parties, (2) proper parties whose interests are separable from others so a decree *can* be made without affecting them in their absence and,

(3) "persons who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without affecting that interest."

Any decree setting aside the compromise of the notes in that case obviously would have affected the absent maker and endorsers by attempting to restore their liability on the notes. Hence, this court dismissed the bill.

And within the circuit where our case arose (8 Cir. as formerly constituted), the rule was discerned and applied to an equity suit to determine and quiet title to a remainder interest under a trust. But the life tenants were not present. Since ascertainment and determination of the remainder necessarily involved the life tenants, they were indispensable parties without whom, the court held, it could not proceed. Franz vs. Buder (8 Cir.) 11 F. (2d) 854.

The rule is well settled in Utah. The Supreme Court of this state holds that if any owner be omitted in an equity foreclosure proceedings the decree of foreclosure is totally void,—**even as to parties present.** Mickelson vs. Anderson, 81 Utah 444, 19 P. (2d) 1033. Hoyt vs. Upper Marion Ditch Company, 94 Utah 134, 76 P. (2d) 234. Reader vs. District Court, 98 Utah 1, 94 P. (2d) 858.

And the rule has already been recognized as applying to the particular bankruptcy act before us (§75). In re Harris (D. C. Md.), 15 F. Supp. 404. There only one tenant in *common* was in court. A mother-farmer owning one-third of a farm filed her petition for relief. Her cotenant children owning the remaining two-thirds were absent. The petition was dismissed for the nonjoinder. The dismissal, the court said, was,—

> "by reason of the fact that there are *not* before the court parties who are indispensable to the proceeding, to-wit, the children of the debtor who have a *two-thirds* interest in the farm property, possession of which the debtor is seeking to retain under the moratorium provisions of subsection (s). "A proceeding of this kind is essentially an *equit-*

able proceeding, and a court of equity cannot affect the rights of necessary parties unless they have been brought under the jurisdiction of the court." (Italics added).

Referring to Barney vs. Baltimore City and California vs. Southern Pacific R. Co. supra, by this Honorable Court as expounding the rule, the Maryland federal judge observed it required no argument to show the children's interests would be very materially affected by the proceedings,—

> "For example, in consideration of the stay of the mortgage foreclosure on the farm property for a period of three years or such lesser period as the court may determine, and permitting the debtor to remain in possession of her property during such period, she is required to pay into court a reasonable rental for the same."

But the court reminds us the rental during the 3-year stay would arise from the property in which the *children* with their two-thirds have the major interest. And the children,—

> "Having this interest, this court has no right, *without their consent,* to accept any of their portion of it as rental from their mother for the properties, and a fortiori would have no right, *without their consent,* to disburse any portion of their interest in payment of their mother's creditors." (Italics added).

The futility of efforts in equity regarding rights of absent parties is revealed thus:

> "If it be argued that it is the duty of the court to accept only such rental and, therefore, to make only such disbursements to maintain the property, as would represent the proportionate part of the rental on the *debtor's* one-third interest, suffice it to say that *the children would still have to consent to such apportionment.* See Barney v. Baltimore City, supra." (Italics added).

Should the mother alone occupy the farm or she and only some of her cotenant children, rental for the full estate would still have to be paid because, as the judge points out, occupancy could not be partial, and,—

> "Thus, under any possible situation, the interest of some, if not all, of the children is involved."

Furthermore, it was observed, the absent cotenants may have creditors:

> "If so, such creditors must be afforded an opportunity to pass upon a plan for liquidation of what is due them before being compelled to forego(ing) all chance of settlement, for perhaps three years."

In conclusion, the court turns to the Act, §75(s)(4), 11 U. S. C. A. §203(s)(4) providing for a joinder of cotenants quoted at page 1 herein. This, it is said, supports the conclusion reached,—

> "*That is to say, the act seems to recognize that the court has no jurisdiction of tenants in common unless all such tenants are before the court,* providing that, for simplification of the proceedings, *all* may join in *one* petition." (Italics added). In re Harris, supra.

Our case is more compelling. Here is a *joint tenancy* as compared to a tenancy in *common* in the Harris case supra. Were one joint tenant to proceed alone and later die, the court would find itself with no property before it, for by death the petitioning joint tenant would be eliminated; the distinguishing incident of a *joint* tenancy being full title in the survivor instead of its passing to the deceased's heirs. 2 Thompson Real Property 927, §1712.

The result is not dissimilar to a proceedings by one tenant by *entirety*. He may not proceed alone. Not even in general bankruptcy, for the trustee can take no title to such an estate for on the death of one the other takes the whole title. In re Beihl (D. C. Pa.) 197 F. 870. In re Meyer, 81 A. 145, 232 Pa. 89, Ann. Cas. 1912C, 1240, 36 L. R. A. (N. S.) 205. McMullen vs. Zabawski (D. C. Mich.) 283 F. 552. In re Berry (D C. Mich.) 247 F. 700. In re Kearns (C. C. A. N. C.) 8 F. (2d) 437, 6 Am. Bankr. Rep.

(N. S.) 614, certiorari denied Cullom vs. Kearns, 46 S. Ct. 203, 269 U. S. 587, 70 L. Ed. 426. **And where entireties obtain the interest of spouses purchasing under a contract of sale is an estate by entireties. In re Berry, supra.**

In General Bankruptcy proceedings title vests in the trustee. **But not so by §75.** Those *special* bankruptcy proceedings do not operate to pass title to a bankruptcy trustee or court. The status quo is preserved pending composition and extension. Under those special proceedings, as the court below observed,—

> "the debtor will retain title and *emerge from the proceedings seized with all the property subjected to the bankruptcy proceedings.* Wright vs. Union Central Life Ins. Co., supra." Miller vs. Mangus, 125 F. (2d) 507, 511 (R. 39).

Thus Mangus, if he could proceed alone under §75, would continue to own title as a joint tenant and emerge later as such in full joint tenancy with his wife. Retaining his title as joint tenant throughout, no severance would result as might be the case perhaps in *General* Bankruptcy by the passing of title to a trustee. And since the joint tenancy would thus be preserved, the absent joint tenant would be indispensable. No orders regarding control, extending time of payment, reducing interest rates, providing for possession for three years, or fixing rent payable (§75, subs. e, j, k, s-2) could be possible without encountering the rights and interests of the absent joint tenant.

Benitez vs. Bank of Nova Scotia (1 Cir.) 125 F. (2d) 523 is identical in principle. The wife of a member of a Puerto Rican "Comunidad" (partnership) filed without her husband, the other member. She thought this would subject the partnership property to the bankruptcy jurisdiction. But the Circuit Court of Appeals held that the filing of a petition by one partner did not carry into bankruptcy the partnership estate but that as provided by the Act all such persons (the partners) must join.

Under the rule, the filing by Walter, one joint tenant, did not carry into bankruptcy the joint estate.

III.

THE SUBSEQUENT JOINDER BY ROSE L. MANGUS, THE OTHER JOINT TENANT, AFTER FORFEITURE OCCURRED DID NOT SUPPLY JURISDICTION.

The forfeiture of the contract was appointed for January 3, 1941 by respondent's demand for performance by that date (R. 5, 9). The petition by the one joint tenant, Walter, as we have seen did not effect jurisdiction over the joint estate. Since it did not, that estate continued free from the proceedings. Being free, respondent's notice and demand and the impending forfeiture of that estate for nonperformance by January 3rd continued to attach in full vigor. And so on January 3rd the forfeiture thus occurred as forfeitures will in Utah where nonperformance results after a purchaser is warned to perform on pain of forfeiture set for a date certain if he fail. (R. 37). Federal Land Bank vs. Sorenson (Utah) 121 P. (2d) 398. Christy vs. Guild (Utah) 121 P. (2d) 401. Leone vs. Zuniga, 84 Utah 417, 34 P. (2d) 699, 94 A. L. R. 1232. Munson vs. Apartment and Hotel Investment Co., 62 Utah 13, 218 P. 109. Malmstrom vs. Second East Apartment Co., 74 Utah 206, 278 P. 811. Tullis vs. Pratt, 86 Utah 244, 42 P. (2d) 222. Columbia Airways vs. Stevens, 80 Utah 215, 14 P. (2d) 984. See also this case below, 125 F. (2d) 507, 510. (R. 37).

And Rose Mangus did not join the proceedings until after the forfeiture,—February 6, 1941. This was too late. The forfeiture had already occurred over a month before. The joint tenants had had fair warning. They had failed to cure their default. They had failed to perform. One of them alone had filed. But that filing failed to effect jurisdiction over the joint estate. Thus, of course, the appointed forfeiture was not arrested. When it occurred on January 3rd the joint tenants no longer had any interest in the property and none existed to be taken into bankruptcy by them.

The filing by one joint tenant before forfeiture was insufficient to confer, and the joinder by the other after forfeiture was insufficient to supply bankruptcy jurisdiction over the property. Since their interest had expired

before both were in court, the joint tenants could not confer jurisdiction. Wright vs. Union Central Life Ins. Co., 58 S. Ct. 1025, 304 U. S. 502. Union Bank vs. Byerly, 60 S. Ct. 773, 310 U. S. 1. It has already been held in the circuit below that where the debtor's interest in such a contract has been forfeited under Utah law, he cannot list the property and thereby confer jurisdiction over it. Bastian vs. Erickson (10 Cir.) 114 F. (2d) 338.

IV.

PRACTICAL ASPECTS.

If one joint tenant may proceed alone (and §75-s-4 forbids) what will result? Suppose so cast the proceedings continue into subsection "s" as they usually do. What then

1. Upon appraisal what shall be appraised, the entire estate or one-half? Remember, the absent joint tenant (before forfeiture) has his interest, and his rights lie athwart any effort of the court to deal with the property.

2. Upon fixing rent what shall be the basis, the whole estate and its full rental value, or a one-half interest and half the rental value?

3. The Circuit Court below observed rightfully that Rose's interest had of course reverted to respondent, seller, by the forfeiture. If Walter may proceed alone, are he and respondent then cotenants? If so, can any rent be allowed? Cotenants may not ordinarily demand rent from each other.

4. On final payment at the end of the three-year stay when Walter alone emerges from the proceedings, what must he pay respondent to free his interest? Only one-half the appraised value? If so, the court has made a new contract for the parties. Respondent did not agree to sell for half, but for the full amount.

5. What, if Walter's petition alone were good, would be his interest over which bankruptcy has jurisdiction? Is it one-half? *Remember Rose is now forfeited out.* If it be one-half and Walter be entitled to that much by conveyance, the court has again made a new contract. Respondent agreed to sell and convey not one-half but the whole estate. To compel him to convey only one-half is to make a new contract for the parties.

6. Suppose the proceedings did not continue but stop-

ped short of subsection (s) (the 3-year stay). Walter thus out of bankruptcy and perhaps in funds would have to pay how much to clear his interest? One-half the balance for a deed of one-half, or the entire balance for a deed of one-half? Remember the full estate is not deliverable for Rose has been forfeited out. Respondent did not agree to sell half for $2000.00, but the entire estate for $4000.00. Nor did Walter agree to pay $4000.00 for half.

These are some of the questions which result if a petition by one cotenant is sufficient. If Rose had timely joined, the result would not be in doubt. Both, and the whole estate, would then have been before the court and subject to its jurisdiction and orders. The result would have been clear. But only confusion can result where one alone petitions.

That confusion simply illustrates the occasion for the rule that equity is forced to deny its jurisdiction unless all who may be affected by its processes are before it. It was upon that consideration that Congress directed all cotenants to join in the proceedings. It was for that reason that the Maryland federal judge held he was without jurisdiction. In re Harris supra. It was for similar reasons the First Circuit Court of Appeals was correct in denying jurisdiction over a partnership estate where only one partner had filed. Benitez vs. Bank of N. S. supra. And it was for the same reason that the Circuit Court below herein held no jurisdiction was conferred over the joint estate by petition of Walter alone.

V.

CONCLUSION.

Why petitioners did not both join in the original petition for relief we are not told. If it was in hopes to gain two successive 3-year stays against respondent—one by the husband and another afterward by the wife and thus withhold respondent's property six years—petitioners grossly miscalculated their rights. While this may have been their ambition, Congress certainly intended no such unconscionable mischief. One stay, yes; but several, never.

Yet no end of successive stays are possible if less than all may proceed. Each in turn may petition as soon and so often as a prior stay is about to expire. And the number of stays possible will depend in each case only on the number of cotenants. And each deliberately may create additional cotenancies and enlarge the opportunity for additional stays by the simple and legal device of conveying away fractional interests in his own partial ownership. Thus a continuing and interminable stay could be obtained. Such mischief cannot be attributed to congressional purpose.

Respondent submits:

1. The petition by Walter L. Mangus alone did not confer jurisdiction over the joint estate.

2. The subsequent joinder by Rose L. Mangus after forfeiture did not add to the lacking jurisdiction.

The judgment of the Circuit Court of Appeals below striking out and dismissing the property from the proceedings was clearly right. Certiorari should be denied.

Respectfully submitted,

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April 29, 1942.